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IN THE

Supreme Court of the United States

October Term, 1964

No. 954

ERWIN H. EZZES,
Petitioner,

against

SOL. A. DANN, ET AL., and MARY L. GALLO, ET AL.,
Respondents, Plaintiffs below,

and

CHRYSLER CORPORATION, ET AL., and PAUL C. ACKERMAN, ET AL.,
Respondents, Defendants below,

and

HERMAN KOENIGSBERG and VIRGINIA JUDSON, ET AL.,
Respondents, Objectors below,

and

ARTHUR HOFFMAN,
Petitioner (No. 89, Oct. Term 1964).
Objector below.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF OF RESPONDENTS, MARY L. GALLO AND A. JAMES GALLO, IN OPPOSITION TO PETITION OF ERWIN H. EZZES

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ERWIN H. EZZES,

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Respondents, Plaintiffs below,

and

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Respondents, Defendants below,

and

HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, *et al.*,
Respondents, Objectors below,

and

ARTHUR HOFFMAN,
Petitioner (No. 893, October Term 1964),
Objector below.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF OF RESPONDENTS, MARY L. GALLO AND A. JAMES GALLO, IN OPPOSITION TO PETITION OF ERWIN H. EZZES

This brief is confined to opposition to the instant Ezzes petition for a writ of certiorari. The Gallo respondents have heretofore filed a separate brief in opposition to the Hoffman petition for such writ (No. 893, October Term, 1964).

Opinions Below

The opinions of the Court of Chancery of the State of Delaware are reported as *Dann* v. *Chrysler Corporation* in 198 A. 2d 185 (1963), and are reprinted in the Appendix to the Gallo brief in opposition to the Hoffman petition (Gallo A 1-41).* The opinion of the Supreme Court of the State of Delaware, affirming the judgment of the Court of Chancery, is reported as *Hoffman* v. *Dann* in 205 A. 2d 343 (1963), and is reprinted in the Appendix to the Hoffman petition (Hof. 9-30).

Jurisdiction

Petitioner Ezzes contends for jurisdiction of this Court based on 28 U. S. C. § 1257(3). He asserts that a federal question is involved in relation to Section 14(a) of the Securities Exchange Act of 1934 ("the Act"), 15 U. S. C. Sec. 78n(a), and Rule 14a-9, 17 CFR 240.14a-9**, promulgated thereunder by the Securities and Exchange Commission ("SEC").

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* Reference will be made to the following Appendices: to this brief (GA); to the Gallo brief in opposition to the Hoffman petition (Gallo A); to the Ezzes petition (Ezzes A); to the Hoffman petition (Hof. A); and to the printed appendix of the defendants-appellees in the court below (A). Docket entry references will be denominated S. Ct. Dkt. # , for those of the Supreme Court of Delaware; Gallo Dkt. # , for those of the Gallo action in the Court of Chancery; and Dann Dkt. # , for those of the Dann action in the Court of Chancery. Gallo exhibits will be referred to as GX; defendant exhibits as DX; and objector exhibits as OX.

** Petitioner Ezzes has printed only a portion of Rule 14a-9 in his appendix (Ezzes A 26), omitting a pertinent part. Accordingly, the Rule is printed in its entirety in the appendix to this brief (GA 14-15). In addition, the petitioner does not refer to any of the other relevant Rules promulgated by the SEC under Sec. 14(a) of the Act, particularly Rule 14a-3 and Schedule 14A, pertinent parts of which are printed in the appendix to this brief (GA 13-14).

The Gallo respondents submit that this Court does not have jurisdiction to entertain the instant petition. The petition was not filed within the time prescribed by 28 U. S. C. § 2101(c). No federal question was raised by petitioner before the Delaware courts; and none was decided by the Delaware courts.

Questions Presented

The litigation before the Court of Chancery involved two stockholders' derivative actions which had been instituted in behalf of Chrysler Corporation ("Chrysler"), a Delaware corporation. A proposed settlement was presented to that court for approval. A principal feature of the settlement is the modification of the Incentive Compensation Plan of Chrysler. Both the proposed settlement and the stockholders' resolution modifying the Plan were approved by the stockholders of Chrysler, subject to court approval. After extensive hearings, on notice to all Chrysler stockholders, the Court of Chancery approved the settlement. The Supreme Court of Delaware affirmed.

The petitioner predicates his application for certiorari on the ground that the Delaware courts should not have approved the adoption of the Plan modification because, as he asserts, its approval by the stockholders was solicited by false and misleading proxies in violation of Section 14(a) of the Act.

Petitioner's contention is bottomed on unfounded assumptions. He assumes that the proxy statement was false and misleading. The Delaware courts, however, found to the contrary. He also assumes that the application of Section 14(a) was specially set up or claimed by him below to be an issue for determination by the Delaware courts. This he never did below. He further assumes that Section 14(a) was violated; and this also is a false assumption.

The Gallo respondents will presently demonstrate:

1. That petitioner failed to file timely his petition for a writ of certiorari within ninety days after the final determination of the Supreme Court of Delaware.

2. That under Delaware practice, the Supreme Court of Delaware will not review any question which has not been fairly presented to the Court of Chancery. The petitioner never raised a federal question before the Court of Chancery. Furthermore, petitioner did not raise a federal question before the Supreme Court of Delaware; and none was decided by that court.

3. That the proxy statement contained full disclosure as required both by Delaware law and by Section 14(a) and the Rules promulgated by the SEC thereunder. The Delaware courts found that the stockholders' vote was validly obtained.

Counter-Statement of the Facts

The Court is respectfully referred to pages 4-14 of the Gallo brief filed in opposition to the Hoffman petition, for a summary of the proceedings in the instant litigation. However, to correct certain errors in the Ezzes statement of facts, a limited counter-statement is necessary here.

The Stipulation of Settlement was signed by all counsel subject to court approval (A 31-41). It was executed by Chrysler counsel upon authorization of the Board of Directors (A 41; OX 411). As part of the settlement, the Board adopted a resolution "recommending to the stockholders" that they adopt resolutions modifying the Incentive Compensation Plan, subject to the approval of the settlement by the court (OX 412; A 34; GA 6).

A detailed and court-approved Notice of Settlement was enclosed with the Proxy Statement, dated March 4, 1963, for the Annual and Special Meetings of Chrysler

stockholders held on April 16, 1963 (DX 300; A 7-30; GA 3-12), at which, *inter alia*, the Chrysler stockholders voted in favor of the settlement and the proposed Plan modification. The stockholders were advised in the Proxy Statement that a vote in favor of the Plan modification "will, in effect, be a vote in favor of the settlement" (GA 6).

Ezzes states at pages 6-7 of his petition that the "approval" of the settlement and modified Plan by the Board of Directors was invalid as being in violation of Art. II, Secs. 6 and 9, of Chrysler's By-Laws. That statement is clearly contrary to the finding of the Delaware Supreme Court (Ezzes A 22-23). Moreover, if Board "approval" of the proposed settlement could not have been given, then Chrysler could not have become a signatory to the proposed Stipulation of Settlement, and neither this nor any other settlement of stockholders' derivative litigation would be possible. The Delaware law does not lend itself to such an impossible situation* Furthermore, the court held that whether or not there was some legal defect in the directors' action, that defect could be cured by informed stockholder action (A 23).**

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* A similar argument was made before the Delaware Supreme Court in *Rome* v. *Archer*, 197 A. 2d 49 (S. Ct., Del., 1964), and was found to lack merit: "Again, this argument begs the question since it presumes the validity of plaintiff's case, and, if this were a valid objection, settlement of derivative suits would be impossible. In addition, the settlement agreement was ratified by a very large majority of the shareholders and was opposed only by these objectants."

** In addition, Article II, Sec. 9, of the By-Laws of Chrysler specifically provides that the Board of Directors in its discretion may submit any contract or act for approval or ratification at any annual or special meeting of stockholders and any such contract or act which is approved or ratified by a vote of the holders of a majority of Chrysler's stock "shall be as valid and as binding upon the Corporation and upon all the stockholders as though it had been approved and ratified by every stockholder of the Corporation" (A 220).

Ezzes makes the unfounded claim that the Proxy Statement was false and misleading and violated Section 14(a) of the Act. At pages 7-10 of his petition, he contends, at the time the settlement negotiations were finalized in February and March 1963, that based on future earnings for the *full* calendar year, the directors were "*assured*" that the modified Plan would produce a substantially greater fund than would the old Plan for calendar 1963. He makes this contention despite the fact that not even the first quarter of calendar 1963 had been completed at the time and notwithstanding obvious uncertainties as to public reception of the 1964 Chrysler models scheduled to appear in August 1963. The failure of the directors to disclose such "assured" result in the Proxy Statement, he asserts, rendered it false and misleading and violative of Section 14(a). He reaches this untenable conclusion by misapplying and misquoting the decision of the Chancellor. Parenthetically, this is aside from the fact that Ezzes never specially set up or claimed a violation of Section 14(a) before the Delaware courts.

At no time during the settlement proceeding before the Chancellor did Ezzes contend that the Proxy Statement was false and misleading on the prospective earnings theory. In his briefs to the Chancellor(Dann Dkt. #238, 249), Ezzes raised other unrelated theories upon which he claimed that the Proxy Statement was false and misleading. However, the Chancellor specifically found in his decision that the Proxy Statement was *not* false and misleading (Gallo A 9):

> "I should note preliminarily that the objector Ezzes charges that the 1963 proxy statement was tainted with fraud. This charge is based on the claim that the statement did not adequately or fully describe the nature of the claims and the effect of the proposed settlement. I find no merit to these charges."

The Chancellor considered 1963 earnings solely in the context of his determination of the fairness of the proposed settlement; and particularly his evaluation of the proposed Plan modification insofar as the director defendants were concerned because the Plan modification was tendered as the basis of the settlement rather than any "consideration" flowing directly from the defendants (Gallo A 39). The Chancellor's decision was rendered on December 31, 1963 (Gallo Dkt. #82). He imposed a limited qualification on his approval of the fairness of the settlement by requiring as a condition to approval that the defendant directors forego any bonus awards under the modified Plan for the year 1963 in excess of what they would have received under the old Plan (Gallo A 36). The Chancellor imposed this condition after concluding that the directors finalized the settlement in February and March 1963 "in the context of a profit picture for Chrysler that *practically* assured the directors that the 'new' plan would produce a substantially greater fund than would the old plan for 1963." (Gallo A 36, 40).

At page 7 of his petition, Ezzes misquotes the Chancellor by omitting the important qualifying word, "*practically.*" Thereafter, for the balance of his petition Ezzes assumes the position that the directors had assured knowledge in that respect at the time the Proxy Statement was sent to the stockholders in early March 1963, which is altogether different from what the Chancellor found. Significantly, in his decision on reargument, the Chancellor uses the words, "expectations" and "probably assure", in his discussion of the limited condition he imposed (Gallo A 40). Moreover, the Delaware Supreme Court in adverting to the limited condition referred to the "fortuitous circumstance" that Chrysler's earnings for 1963 were greatly larger than for 1962 (Hof. A 27).

Ezzes himself recognized that there was no *assurance* with respect to the amount of 1963 earnings or that 1963

earnings would exceed the cross-over point. In arguing against the fairness of the proposed settlement, at pages 51-52 of his principal brief to the Chancellor, dated June 28, 1963 (Dann Dkt. #238), Ezzes stated: "If * * * the probable earnings expectation becomes a reality * * *." In his reply brief, dated August 12, 1963 (Dann Dkt. #249), he stated at pages 1-2: "During the course of the hearings, there was speculation concerning whether the cross-over point would be exceeded in 1963."

The Chancellor in no sense related the limited condition to the Proxy Statement, nor did he, in the remotest degree, conclude or infer that the Proxy Statement was false and misleading by reason of any non-disclosure. In fact, the Chancellor made the express finding that the Proxy Statement was not false or misleading (Gallo A 9).

Importantly, after the Chancellor's decision, on his motion for reargument thereof, Ezzes did not contend that the stockholders' vote approving the settlement and Plan modification was invalid because of any non-disclosure in the Proxy Statement (GA 1). He sought only to have the limited condition extended to all 3,009 officers and employees who were covered under the Plan, so that the new Plan formula would not become operative until the year 1964 (GA 1). The motion for reargument was denied (Gallo A 38-41).

It was not until his principal brief on appeal to the Delaware Supreme Court that Ezzes for the first time contended that the Proxy Statement was false and misleading because of alleged non-disclosure of the directors' knowledge of Chrysler's 1963 earnings. But, he relied *solely on Delaware law* and did not make reference to Section 14(a) or to Rule 14a-9.

Finally, in his reply brief, at page 5, Ezzes contended, by way of response and in the context of cited State court decisions, that the Proxy Statement itself should have con-

tained the alleged information about the prospective financial condition of Chrysler regardless of the fact that the stockholders had received the Annual Report in the preceding month. At that juncture he made a passing (and his only) reference to Rule 14a-9 [not to Sec. 14(a)]; and this, illustratively, in support of his limited common law reply argument (S. Ct. Dkt. #16).

The Delaware Supreme Court rejected Ezzes' common law arguments concerning the claimed invalidity of the stockholders' vote (Ezzes A 24). The court was satisfied that the stockholders were fully informed and acted in the light of their information. The court considered that in any event the limited condition imposed by the Chancellor took care of Ezzes' charge that the directors knew that the modified Plan would produce a greater bonus fund for 1963 than would the old Plan if, "possibly", the stockholders did not also know this (Ezzes A 24).

Ezzes did not file a petition for reargument with the Supreme Court of Delaware.

With respect to the Plan modification itself, both the Chancellor and the Delaware Supreme Court found that the modified Plan is beneficial to Chrysler and its stockholders (Gallo A 28, 35-36; Hof. A. 24, 28). Ezzes' assertion, interspersed throughout his petition, that the modified Plan is detrimental, is contrary to the findings of the Delaware courts and to the extensive record establishing its benefits.

ARGUMENT

I.

This Court does not have jurisdiction to entertain the Ezzes petition.

A. The Ezzes Petition Was Not Timely Filed.

The decision of the Supreme Court of Delaware was rendered on November 17, 1964, and docketed the next day (S. Ct., Dkt. #19). It expressly affirmed the judgment of the Court of Chancery (Hof. A 30). The decision was the final determination of the Delaware Supreme Court; it was never modified or amended thereafter. *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, 211-12 (1952). The time for filing the instant Ezzes petition commenced running from the date of final decision of the Supreme Court of Delaware, irrespective of the later date of mandate. *Market Street R. Co.* v. *Railroad Commission*, 324 U. S. 548, 551 (1945). Petitioner Ezzes did not seek reargument before the Delaware Supreme Court. For his purposes then, the November 17, 1964 decision of the highest Delaware court was then and there the final determination in the case. As this Court stated in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 306 (1962), "A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy and inexpensive determination of every action': the touchstone of federal procedure."

Nor may the motions for reargument made to the Delaware Supreme Court by others than Ezzes, which did not result in any change in the final decision, operate to extend Ezzes' time to file for certiorari. He did not seek reargument himself. *Zimmern* v. *United States*, 79 F. 2d 703 (5th Cir., 1935), reversed on other grounds, 298 U. S. 167 (1936).

Petitioner Ezzes did not file his instant petition until March 4, 1965, more than ninety days after the final decision. His filing is late and not within the time prescribed by 28 U. S. C. § 2101(c). This Court therefore does not have jurisdiction, it is submitted. *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co., supra.*

B. No Federal Question Was Specially Set Up or Claimed by Petitioner in the Delaware Courts.

The jurisdiction of this Court to review the final determination of the Supreme Court of Delaware attaches only if the petitioner "specially set up or claimed" a federal question and brought such claim and the grounds therefor, with fair precision, to the Delaware courts for determination. *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 67 (1928).

Ezzes did not comply with this prerequisite to jurisdiction.

Firstly, this Court has held on numerous occasions that if State procedure requires a question to be raised in the State court at the trial level and the petitioner failed to do so, this Court will not entertain jurisdiction if the State's highest tribunal declined to entertain the question. State procedure in this respect applies to federal questions just as it does to questions of local or general law. *John* v. *Paullin,* 231 U. S. 583, 585 (1913); *Bailey* v. *Anderson,* 326 U. S. 203 (1945). As this Court stated in *John* v. *Paullin,* "In legal effect, however, the case stands as though no appeal has been prosecuted from the judgment rendered by the trial court" (231 U. S., p. 587).

Delaware procedure prescribes that no question may be raised on appeal to the Delaware Supreme Court unless it has been fairly presented to the court below for decision.

Rule 5(7), Rules of the Supreme Court of Delaware (Vol. 13, Del. Code Ann., Court Rules, 1964 Supp., pp. 5-6).*

This rule has long been the prescribed procedural requirement in Delaware. *Pepe* v. *State,* 171 A. 2d 216, 219 (S. Ct., Del., 1961), appeal dismissed, cert. den. 368 U. S. 31 (1961); *Robinson* v. *Meding,* 163 A. 2d 272, 277-8 (S. Ct., Del., 1960); *Cottrell* v. *Pawcatuck Company* 36 Del. Ch. 169, 128 A. 2d 225, 233 (S. Ct., Del., 1956), cert. den. 355 U. S. 12 (1957); *Kerbs* v. *California Eastern Airways, Inc.,* 91 A. 2d 62, 63 (S. Ct. Del., 1952); *Equitable Trust Co.* v. *Gallagher,* 77 A. 2d 548, 549-550 (S. Ct., Del., 1950); *Shanik* v. *White Sewing Machine Corporation,* 25 Del. Ch. 371, 19 A. 2d 831 (S. Ct., Del., 1941); *Stephenson* v. *Commonwealth & Southern Corp.,* 19 Del. Ch. 447, 168 Atl. 211 (S. Ct., Del., 1933).

In the *Cottrell* case, *supra,* the appellant sought to raise a constitutional question for the first time on his appeal to the Delaware Supreme Court. In accordance with the rule, the court declined to consider the question.

The record is clear that Ezzes did not raise any federal question before the Delaware Chancery Court. He never there contended that Section 14(a) or Rule 14a-9 had been violated. He did not even raise under Delaware law the matter of the claimed invalidity of the stockholders' vote on the theory contended for in this Court. Nor did he advance that theory before the Chancellor on his motion for reargument, either on federal or non-federal grounds.

Consequently, having failed to comply with the Delaware rule by not presenting the federal question to the

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* Rule 5(7) provides:

"(7) *Questions Which May Be Raised on Appeal.* On appeal, any question may be raised which has been fairly presented to the court below for decision, and it shall not be necessary again to raise any such question raised in the cause by way of motion for a new trial."

Court of Chancery, he may not raise the federal question in this Court. *John* v. *Paullin, supra; Bailey* v. *Anderson, supra.*

Moreover, Ezzes did not specially set up or claim a violation of Section 14(a) and Rule 14a-9 in the Supreme Court of Delaware. In his principal brief to that court he raised the question presented to this Court solely on grounds of State law.* He made only passing reference to Section 14(a) and Rule 14a-9, and that for the first time, in his reply brief for purposes of replication and, illustratively, in support of his State law contentions. As this Court appositely stated in *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648, 653, 655 (1897):

> "Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any Federal right, privilege or immunity was intended to be asserted. For aught that appears the state court proceeded in its determination of the cause without any thought that it was expected to decide a federal question. * * * The jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference but only from averment so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

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* Rule 9(2)(d) of the Rules of the Delaware Supreme Court requires that the appellant set forth in his principal brief a statement of the questions involved and, "Except for unusual and compelling reasons, no point will be considered that is not set forth in or necessarily suggested by the statement." Rule 9(2)(f) prescribes that the Argument in the appellant's Principal Brief "shall be divided, under appropriate headings distinctly set forth, into as many parts as there are questions presented." Ezzes did not set forth the claimed violation of Section 14(a) or Rule 14a-9 as a question nor did he raise any point of such statutory violation in his argument (Vol. 13, Del. Code Ann., Court Rules, p. 16).

Petitioner Ezzes has failed to comply with Rule 23(f) of this Court. He does not specify the information required by that rule to show that the federal question was timely and properly raised in the Delaware courts so as to give this Court jurisdiction. It is apparent that he is unable to do so.

Having failed timely and properly to raise a federal question in the Delaware courts, and none having been decided, Ezzes may not raise the federal question for the first time in this Court. *White River Lumber Company* v. *Arkansas*, 279 U. S. 692, 700 (1929); *Whitney* v. *California*, 247 U. S. 357, 362-3 (1927); *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 248 (1902).

Even if Ezzes had properly raised both the federal and non-federal grounds before the Delaware Supreme Court, this Court would nevertheless decline jurisdiction to review because the state court decision was rendered on adequate non-federal grounds. *Enterprise Irrigation District* v. *Farmers Mutual Canal Company*, 243 U. S. 157, 164 (1917); *Berea College* v. *Kentucky*, 211 U. S. 45, 53 (1905); *Wood* v. *Chesborough*, 228 U. S. 672, 677 (1913).

II.

The 1963 proxy statement complied fully with the requirements of both Delaware Law and Section 14(a) of the Act and the Rules of the SEC promulgated thereunder.

A. The Inclusion in the March 4, 1963 Proxy Statement of an Estimate of Future Earnings of Chrysler, as Ezzes Urges, Would Have Constituted a Flagrant Violation of Both Delaware Law and the Proxy Rules of the SEC.

The Delaware Supreme Court expressly found that "no one can predict Chrysler's future earnings", and that "in a business such as the automobile industry, profits take their ups and downs" (Hof. A 28). The Chancellor also

noted that "no one can predict with certainty what degree of success Chrysler will have in its operations in future years." (Gallo A 32). He also noted Chrysler's past history of profitable and loss years (Gallo A 32). He further stated that "no one will deny, moreover, that the earnings of a major business corporation engaged in the production of automobiles are subject to a number of variables." (Gallo A 32).

As shown in the counter-statement of facts in this brief, the Chancellor imposed the limited condition in the particular context of his evaluation of the fairness of the settlement, and not on any basis of a false and misleading Proxy Statement. Obviously, the Chancellor did not find that the defendant directors in February and March 1963 knew as an existing and accomplished fact what the earnings were or would be for the full twelve months of the calendar year 1963. It is petitioner Ezzes only who leaps beyond the scope of the Chancellor's decision to reach his unfounded conclusions that those defendants in February and March 1963 had "assured" knowledge of the full year 1963 earnings, and that by failing to disclose such "information" in the March 4, 1963 Proxy Statement they violated Section 14(a) and Rule 14a-9.

The earnings history of Chrysler in the five years preceding 1963 serves as a significant background in this respect (GX10-13; OX4(9)):

Year Ended December 31	Net Earnings (or Loss) (Consolidated)
1962	$65,433,936
1961	11,138,436
1960	32,154,393
1959	(5,431,024)
1958	(33,824,565)

The chief executive officers of Chrysler testified at the settlement hearings that they could not possibly predict the earnings of Chrysler for the year 1963, because of the

volatile nature of the business and the many uncertainties and variables involved (A 135-138; A 145-146; A 109-110). Furthermore, while the Chrysler 1963 models had received public acceptance, the Chairman of the Board testified that there was then no way of knowing how the public would receive the 1964 models. The 1964 model year began in August 1963. Consequently, the last quarter of the calendar year 1963 was critical (A 137).

The SEC considers the prediction of earnings in a proxy statement to be a primary evil. It explicitly includes that type of prediction in its first example under Rule 14a-9 of what the Commission considers may be misleading (GA 15). The SEC added the examples to Rule 14a-9 in 1956.* The first example provides:

> "(a) Predictions as to specific future market values, earnings, or dividends." (GA 15)

Commissioner J. Sinclair Armstrong ** expressed the underlying basis for the examples included under Rule 14a-9:

> "The Commission's experience in the administration of the proxy rules in connection with contest for control of management indicates that the problem with respect to potentially misleading statements and omissions of material fact tend to fall into one of several general categories:
>
> • • •
>
> "7. Claims, promises, or projections as to future earnings, dividends, sales, and increase in value of assets or stock based on mere conjecture or distortion, • • •.

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* Ezzes did not print in his appendix the examples forming part of Rule 14a-9 (Ezzes A 26). They are fully set forth in the appendix to this brief (GA 15).

** Armstrong, *The SEC and Proxy Contests*, 181 Comm. & Fin. Chron., 1032, 1035 (1955), reprinted in Part 3, Stock Market Study, Hearing before Subcom. of Senate Comm. on Banking and Currency, 84th Cong., 1st Session (1955) 1569, 1575-1576.

> "Every one that I have mentioned resulted from actual experience with specific cases, and in each instance the principle involved was hammered out administratively in an effort to hew to the line of fair disclosure for the benefit of the investing public."

The SEC and the Federal courts have uniformly found to be false and misleading under the Proxy Rules the inclusion of forecasts and projections of future earnings in proxy statements. *American Kid Co.*, 1 S. E. C. 694, 698-699 (1936); *United States v. Grayson*, 166 F. 2d 863, 866 (2nd Cir., 1948); *Union Pacific R. Co. v. Chicago and North Western Ry. Co.*, 226 F. Supp. 400, 407-410 (N. D. Ill., 1964).

In the *Union Pacific R. Co.* case, the court found predictions of future earnings in solicitation material to have been false and misleading under Rule 14a-9 and the first example thereunder. The court aptly stated:

> "The Commission's Rule 14a-9 offers 'predictions as to specific future market values, earnings, or dividends' as its first example of what may be false and misleading. There is good reason for this emphasis on prediction. Bald statements contrary to concrete and historic fact run the risk of ready refutation and exposure, and to that degree are self-policing. Predictions, estimates, and opinions are more elusive and may present graver dangers of misleading the investing public. * * * 'Since an expert can speak with authority only as to subjects upon which he has professional knowledge and since no engineering course or other professional training has ever been known to qualify anyone as a clairvoyant, attempts by companies to predict future earnings on their own or on the authority of experts have almost invariably been held by the Commission to be misleading because they suggest to the investor a competence and authority which in fact does not exist.' Heller, Disclosure Requirements Under Federal Securities Regulation, XVI The Business Lawyer 300, 307 (1961). Whether the prediction is the product of an intent to mislead or of innocent overenthusiasm, the misleading effect upon the

> investing public is the same. * * * The court is constrained to agree with the judgment of the SEC staff that such predictions mislead by conveying a certitude which inherently they cannot possess." (226 F. Supp., pp. 408-9)

Obviously, it would have been improper for the management of Chrysler in the Proxy Statement to have predicted future earnings for the full calendar year 1963, or to base any opinions thereon, at a time when the first quarter of the year had not even been completed. This is especially true in the light of the nature of Chrysler's business and its then past earnings history, and the expressed inability of the chief executives of Chrysler to make any such predictions.

At this juncture, it is appropriate to consider that the Chancellor did not find that the defendant directors had "assured" knowledge, albeit Ezzes misquotes him thusly. The Chancellor's finding was limited to "practically assured", "expectations", and "probably assured." There is a wide difference between "assured" and "practically assured", as indicated in *James Blackstone Memorial Library Association* v. *Gulf Mobile and Ohio Railroad Company*, 264 F. 2d 445, 449-451 (7th Cir., 1959). cert. den. 361 U. S. 815 (1959). In that case, the court held that there was no fraudulent concealment or breach of fiduciary duty under Section 10(b) of the Securities Exchange Act by failure of the defendant to disclose to plaintiffs at the time it purchased their shares that a sale of the leasehold property involved was then "practically assured." The property sale became "assured" some seven months after the stock sale. The court distinguished the line of cases in which the property sale was in fact assured at the time of the stock sale.

B. The March 4, 1963 Proxy Statement Contained All the Material Information Required by Delaware Law and the Proxy Rules of the SEC.

Rule 14a-3(a) requires, *inter alia* that a proxy statement contain the information specified in Schedule 14A (GA 13). The 1963 Proxy Statement fully complied with Schedule 14A. The application of both the old and the modified Plan was carefully spelled out (GA 7-12). The Proxy Statement points out clearly that a higher award would be payable at a certain level of higher earnings. As required by Item 9 of Schedule 14A (GA 13), a comparison is made with 1962 figures ("the last fiscal year of the issuer")*. It is pointed out that for 1962, at all levels of earnings above $93,000,000 "the total provision permitted for awards would have been higher than under the present (old) formula***." (GA 8).

In this connection also, before the Chrysler annual and special stockholders meetings held on April 16, 1963, the stockholders had already received the 1962 Annual Report (OX 409), as required by proxy Rule 14a-3(b), which in pertinent part is printed at GA 13. In the 1962 Annual Report, the stockholders were advised in detail about the financial advances made by the Company during the year, as particularly set forth in the statement of the Chairman of the Board and President of Chrysler (GA 2). Deriving such information from an Annual Report prior to the stockholders meeting is also in accord with Delaware law. *Johnson* v. *Consolidated Film Industries, Inc.*, 22 Del. Ch. 262, 267, 194 Atl. 844, 845-6 (Ch. Ct., 1937) aff'd 22 Del. Ch. 407, 197 Atl. 489 (S. Ct., Del. 1937).

It is clear that the stockholders were fully informed of the financial condition of Chrysler at the time. Their approval of the settlement and the Plan modification was

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* The pattern of the Proxy Rules requires a comparison with or disclosure of fully established financial data of prior fiscal years or periods and not projections, future estimates, or opinions.

based upon a fully informed judgment, as both the Chancellor and the Delaware Supreme Court found. Ezzes' contentions in this respect, therefore, are misconceived and erroneous.

C. Petitioner Ezzes Was Afforded Full Relief in the Delaware Courts.

The contention of petitioner Ezzes under his Point III that the Delaware courts did not give the stockholders the protection of the Act is untenable. The main thrust of Ezzes' argument is that the 1963 Proxy Statement was false and misleading. It is fully established that the Delaware courts apply the same standards under its own law as do the Federal courts in applying Section 14(a), with respect to false and misleading proxy statements.

In *Kaufman* v. *Shoenberg*, 154 F. Supp. 64 (D. Del., 1954), the court granted summary judgment for the defendant in an action instituted under Section 14(a) of the Act, on the ground of *res judicata*. The same stockholder had also instituted an action in the Delaware Court of Chancery claiming, *inter alia*, that the proxy statement involved was false and misleading under Delaware law. She made the same claim in her federal suit; but there, under Section 14(a) and the SEC Proxy Rules. The Chancellor had found that the proxy statement was not false and misleading. *Kaufman* v. *Shoenberg*, 33 Del. Ch. 211, 218-219, 91 A. 2d 786, 790-1 (Ch. Ct., 1952). The federal court found that the gist of the actions was the same. It determined that the issue of fraudulent misrepresentations and omissions were conclusively determined against the plaintiff in the Chancery Court action.

The same standards were likewise applied by the Delaware Court of Chancery in the following cases, all relating to claims of false and misleading proxy statements. *Empire Southern Gas Co.* v. *Gray*, 29 Del. Ch. 95, 46 A. 2d 741 (Ch. Ct., 1946); *Hauth* v. *Giant Portland Cement Co.*,

33 Del. Ch. 496, 96 A. 2d 233 (Ch. Ct., 1953); *Campbell* v. *Loew's Incorporated*, 134 A. 2d 852, 864-865 (Ch. Ct., Del., 1957); *Kerbs* v. *California Eastern Airways, Inc.*, 94 A. 2d 217 (Ch. Ct., Del., 1953).

Significantly, in the *Empire Southern Gas Co.* case, the Chancellor was guided by the Section 14(a) case of *S.E.C.* v. *O'Hara*, 28 F. Supp. 523 (D. C., Mass., 1939) in determining the relief to be granted so as to prevent stockholder disenfranchisement. In the *Campbell* case, the Chancellor recognized the SEC review of the proxy material there involved. Furthermore, in the *Empire Southern Gas Co.*, *Hauth* and *Kerbs* cases, the Chancellor gave important consideration to the Sec. 14(4a) decision in *Hand* v. *Missouri-Kansas Pipe Line Co.*, 54 F. Supp. 649 (D. C., Del. 1944).

The limited condition imposed by the Chancellor represents his exercise of discretionary equity powers under traditional practices to shape the remedy as in his judgment the exigencies of the case demand. *Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U. S. 264, 271 (1933); *Chapman* v. *Sheridan-Wyoming Case Co., Inc.*, 338 U. S. 621, 630 (1950); *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955); *The Hecht Company* v. *Bowles*, 321 U. S. 321, 328-330 (1944); *S.E.C.* v. *United States Realty & Improvement Co.*, 310 U. S. 434, 455 (1940).

In substance, the petitioner is seeking to have this Court review the application of Delaware law by the Delaware courts, which this Court has declined to do. *Enterprise Irrigation District* v. *Farmers Mutual Canal Company, supra; Arrowsmith* v. *Harmoning*, 118 U. S. 194 (1886); *Iowa Central Ry. Co.* v. *Iowa*, 160 U. S. 389 (1896).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari of the petitioner Erwin H. Ezzes should be denied.

Respectfully submitted,

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APPENDIX TO BRIEF OF GALLO RESPONDENTS IN OPPOSITIION TO PETITION FOR WRIT OF CERTIORARI BY PETITIONER ERWIN H. EZZES

Objector Ezzes' Motion for Reargument to the Court of Chancery

Objector Erwin H. Ezzes, by his attorneys, moves the Court for reargument upon the ground that the "new" Incentive Compensation Plan should not apply for the year 1963, not only as to the director defendants, but as to all of the beneficiaries under the plan, because the Chancellor's Finding of Fact at page 55 of the Opinion is that, "It is clear that the directors 'bargained' for this settlement in the context of a profit picture for Chrysler that practically assured the directors that the 'new' plan would produce a substantially greater fund than would the old plan for 1963", and, therefore, no one should be allowed to derive additional benefits under the "new" plan as to the year 1963.

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Of Counsel:

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200 West 57th Street
New York 19, New York

Dated: February 4, 1964

Extract From 1962 Chrysler Corporation Annual Report to Its Stockholders

Chrysler Corporation made significant and steady progress in all phases of its world-wide operations in 1962, the first full year under the company's new management. In each quarter of 1962, both dollar sales and earnings exceeded the totals for the same periods in 1961.

A good fourth quarter—the best for any such period in the company's history—carried net earnings for the year to $65.4 million, or $7.24 a share, compared with $11.1 million, or $1.24 a share for 1961. Net earnings for the fourth quarter of 1962 were equal to $5.57 a share, compared with $3.52 a share for the same period last year, and the previous fourth quarter peak of $3.97 a share in 1949.

Dollar sales for Chrysler Corporation and consolidated subsidiaries in 1962 amounted to $2,378 million, compared to $2,127 million in 1961. In the final quarter of the year, following the introduction of our all-new 1963 cars, sales totaled $836 million, an increase of 20% over sales of $696 million in the fourth quarter of 1961. World-wide sales of cars and trucks in 1962 totaled 892,299 units, compared with 802,003 units in 1961.

Reflecting the enthusiastic public acceptance of our 1963 cars, retail sales of Chrysler Corporation cars in the fourth quarter of 1962 amounted to 12.0% of all domestic retail car sales, compared with 9.6% for the first nine months of the year, and 10.3% for the entire calendar year.

The improved financial results for 1962, as well as the indications of continued progress in 1963, can be attributed in large part to the moves made in several key areas * * *.

Extract From Proxy Statement of Chrysler Corporation for Annual and Special Meetings of Stockholders Held on April 16, 1963

(10) INCENTIVE COMPENSATION PLAN

Under the provisions of the Chrysler Corporation Incentive Compensation Plan, awards may be made only for those years when consolidated net earnings before income taxes, provision for incentive compensation and interest on long-term debt exceed 7% of the shareholders' investment and of the long-term debt. The total provision for all participants in the Plan is limited to 5% of such excess. Awards are determined by a committee of directors none of whom are officers of the Corporation or entitled to receive awards under the Plan.

Awards of $2,000 or less are payable in one installment. Awards of more than $2,000 but less than $10,000 are payable in annual installments of $2,000, or the amount remaining if less. Awards of $10,000 or more are payable in five equal annual installments. Thus, awards may be payable in installments over a period of years up to five, and a participant may in a given year receive installments from awards for more than one year. Accordingly, the installments of the awards for 1957 and 1960 that were earned out December 31, 1961 were paid in 1962. No awards were made for the years 1958, 1959, and 1961.

The first installments of the awards for 1962 were earned out as of December 31, 1962 and will be paid on or before March 15, 1963. To earn out and remain entitled to receive payment of each subsequent annual installment of his award, the participant must be in the employ of the Corporation or a subsidiary throughout the year ending December 31 immediately preceding payment of that installment, unless the Corporation shall have waived such requirement, and, in the latter event, he must not have, at any time prior to the December 31 immediately preceding payment of that installment, taken other employment or

rendered services to others than the Corporation or a subsidiary without the consent of the Corporation, or conducted himself in a manner adversely affecting the Corporation.

See page 19 of the proxy statement for the proposal to change the incentive compensation formula.

(19-23) PROPOSAL NO. 4

AMENDING STOCKHOLDERS' RESOLUTION OF APRIL 17, 1956 TO CHANGE INCENTIVE COMPENSATION FORMULA

The proxy statements for the last two annual meetings of the stockholders have mentioned the derivative suits brought by certain stockholders against directors and officers of the Corporation. There are five of these—two in the Court of Chancery, New Castle County, Delaware, two in the Supreme Court, New York County, New York, and one in the United States District Court for the Southern District of New York. The alleged causes of action in the five suits are similar, although some of the suits do not allege all of the causes of action contained in the others.

The directors and officers of the Corporation who are defendants in these suits deny all of the charges of wrongdoing made against them. Attorneys for the plaintiffs in the suits have made lengthy and thorough investigation into the facts and circumstances involved in the suits and have taken depositions from present and former officers and employees of the Corporation. The Corporation produced for such attorneys a large amount of documentary evidence related to the allegations in the suits. The attorneys for the plaintiffs have proposed settling the suits. The directors and officers of the Corporation who are defendants in the suits assert that they are entitled to judgment dismissing the suits on the merits, but recognize that it is

Extract From Proxy Statement of Chrysler Corporation for Annual and Special Meetings of Stockholders Held on April 16, 1963

desirable that such litigation be terminated without further protracted legal proceedings, thus avoiding the expense of further litigation and the expenditure of time on the part of directors, officers and employees of the Corporation whose efforts and energies should be devoted to the business affairs of the Corporation. The parties therefore have entered into a stipulation of settlement setting forth the terms upon which it is proposed to dismiss these suits and also a suit brought by one of the plaintiffs in the United States District Court for the Eastern District of Michigan to set aside the 1961 annual meeting.

The attorneys for the plaintiffs in the two suits in the Delaware Chancery Court have applied to that Court for approval of the proposed settlement and dismissal with prejudice of their two suits. The Court has directed that a hearing be held on the proposed settlement and has approved a notice to the stockholders of the Corporation containing the date on which the hearing will be held and information with respect to the suits and the terms of the proposed settlement which the Court has directed be sent to all holders of record of the Corporation's common stock as of February 26, 1963. A copy of the notice is enclosed with this proxy statement.

The stipulation of settlement provides that if it is approved by the Delaware Court, the parties will seek and if appropriate join in seeking dismissal of the other four suits referred to above (including any appeals in any of them). If the settlement is consummated, the action the Corporation brought against one of the plaintiffs in the above suits, for statements made by him relating to the Corporation's financial condition and credit that were alleged to have been defamatory will be dismissed, the Corporation will pay the legal expenses incurred by him in the action, and he will release his claim of wrongful prosecution of that action.

Extract From Proxy Statement of Chrysler Corporation for Annual and Special Meetings of Stockholders Held on April 16, 1963

One of the principal terms of the stipulation of settlement is that the formula for computing the total provision that may be made for incentive compensation awards by the Corporation be modified. This formula is set forth in a resolution that the stockholders of the Corporation adopted at their annual meeting on April 17, 1956, amending an earlier resolution that the stockholders had adopted in 1929. The stockholders' resolution as so amended is annexed to this proxy statement as Exhibit A.

The Board of Directors recommends that the stockholders adopt the resolutions annexed to this proxy statement as Exhibit [illegible], amending, subject to the approval by the Delaware Court of a settlement of the suits referred to above, the portion of the 1956 stockholders' resolution setting forth the formula for computing the total provision that may be made for incentive compensation awards. The favorable vote of the holders of a majority of the shares voting on the proposal will be required for the adoption of such resolutions.

Since the modification of the formula for computing the total provision that may be made for incentive compensation awards is a principal term of settlement and is necessary if the settlement is to be put into effect, a vote in favor of amending the 1956 stockholders' resolution to change the incentive compensation formula will, in effect, be a vote in favor of the settlement. However, under the provisions of Delaware law, the proposed settlement and the proposed dismissal of the two Delaware suits pursuant to the settlement can be effected only if the Court approves the settlement as fair, reasonable and adequate. The dismissal of the claims alleged in the suits, as provided in the proposed settlement, will be binding on all stockholders if the settlement is approved by the Court.

The 1956 stockholders' resolution, among other things, authorizes the Board of Directors to establish from time to

time one or more plans to enable officers and executives of the Corporation and its subsidiaries to share in the profits of the Corporation. Pursuant thereto, the Board of Directors in 1956 established a plan called the Chrysler Corporation Incentive Compensation Plan and also a Savings and Investment Plan.

This Plan continues the practice followed since 1929, pursuant to authority the stockholders granted, of providing for incentive awards in various forms to encourage the continued and energetic efforts of officers and executives of the Corporation and its subsidiaries and to attract able and competent new executive personnel. The Board of Directors believes that the basic objectives of the Plan are sound and that it has been and still is effective and of benefit to the Corporation and its stockholders.

Under the 1956 stockholders' resolution, incentive compensation awards may be made only for those years when consolidated net earnings of the Corporation and consolidated subsidiaries (as reported in the Annual Report to the Stockholders) *before* taxes on income and before provision for incentive compensation and interest on long-term debt of the Corporation, exceed 7% of the shareholders' investment in the Corporation and consolidated subsidiaries and long-term debt of the Corporation. Total provision for awards is limited to 5% of such excess.

Under the proposed amendment, incentive compensation awards for the years 1963 through 1966 may be made only for those years when the sum of (1) consolidated net earnings of the Corporation and consolidated subsidiaries (as reported in the Annual Report to the Stockholders) *after* taxes on income, (2) provision for incentive compensation, and (3) interest on long-term debt of the Corporation, exceeds 5½% of the shareholders' investment in the Corporation and consolidated subsidiaries and long-term debt of the

Extract From Proxy Statement of Chrysler Corporation for Annual and Special Meetings of Stockholders Held on April 16, 1963

Corporation. The total provision for awards is limited to the lesser of 12% of such excess or the aggregate amount of all dividends declared upon the common stock of the Corporation during that year.

For purposes of comparison, if the existing formula, which is on a pre-tax basis, is converted to an after-tax basis using present income tax rates, the proposed amendment would require consolidated net earnings *after* taxes on income but before provision for incentive compensation and interest on long-term debt to exceed 5½% (instead of approximately 3½% under the existing formula) of shareholders' investment and long-term debt before incentive compensation awards may be made, and the proposed amendment would permit the total provision for awards to be 12% (instead of approximately 10% under the existing formula) of such excess.

Thus, the proposed amendment requires a higher earnings level before awards may be made. For example, under the existing formula the consolidated net earnings after taxes that were required for the year 1962 before awards could be made was $32,600,000. They would have had to have been $44,200,000 if the proposed formula had been in effect. The total provision permitted for awards under the proposed formula would have been less than under the present formula at all levels of consolidated net earnings after taxes below $93,600,000 if such formula had been in effect for 1962, but at all levels of earnings above this amount the total provision permitted for awards would have been higher than under the present formula because the proposed formula permits a larger percentage of the earnings above the minimum level to be used for awards than the present formula does.

Since shareholders' investment, long-term debt and interst thereon, and taxes on income will not be the same in the years 1963 through 1969 as they were in 1962, the con-

solidated net earnings required in those years before awards may be made will not be $44,200,000, nor will $93,000,000 be the earnings level at which the proposed formula will permit a total provision for awards greater than the present formula. The consolidated net earnings required for such purposes will be higher than such amounts if the total of shareholder investment and long-term debt in any of the years 1963 through 1969 is greater than it was in 1962, and will be lower than such amounts if such total is less than it was in 1962. Also, a decrease in income tax rates would mean that the proposed formula would permit a greater total provision for incentive compensation than the present formula at an earnings level lower than $93,000,000.

The proposed amendment to the stockholders' resolution described above would expire at the end of 1969. Therefore, it is also proposed that the stockholders adopt a further resolution requiring the Board of Directors, at a time deemed appropriate by the Board, to submit to the stockholders for action by them the question of extending and altering or amending, effective from and after December 31, 1969, the portion of the stockholders' resolution which sets forth the amount that may be provided for incentive plans. The Board of Directors may submit to the stockholders the question of extending, altering or amending such portion of the stockholders' resolution, effective at a time prior to December 31, 1969, provided, and the Board does not intend to so recommend unless, a majority of the members of the Board then in office who are not eligible to receive an award thereunder shall have determined that, because of a material change in circumstances, it is in the best interests of the Corporation that such portion of the stockholders' resolution be extended, altered or amended. The Board of Directors has no knowledge at this time of any anticipated material change of circumstances which would cause it to make such a determination.

Extract From Proxy Statement of Chrysler Corporation for Annual and Special Meetings of Stockholders Held on April 16, 1963

If the stockholders adopt the amendment, all of the other provisions of the 1956 stockholders' resolution pertaining to incentive compensation will continue in full force and effect. In such event, the Board of Directors intends to continue the Incentive Compensation Plan that it adopted in 1956, modified to comply with the proposed amendment or to adopt a new Incentive Compensation Plan on substantially the same terms as so modified, except in either case the Board of Directors may add provisions permitting a recipient of an award to elect, at his option, to defer payment of all or a portion of the award until retirement or other separation from the employ of the Corporation, and in such case to receive the same in Chrysler stock together with amounts equivalent to the dividends thereon.

Under the present stockholders' resolution and Incentive Compensation Plan, the computation of the amount that may be provided for incentive compensation awards is made by the independent Auditors of the Corporation. If the amount for any year shall for any reason prove to have been overstated and the awards for that year greater than the amount that it finally appears ought to have been computed, the excessive part of the awards are to be offset by the unawarded parts, if any, of amounts that were available for preceding fiscal years (beginning with the fiscal year 1955), and any remaining excess is to be deducted from the amounts available for incentive awards in the year in which the excessive awards are discovered and succeeding years until the excessive part of the awards is made good, without recourse to or charge against any recipient of an award. Additionally, no other adjustment on account of the excessive part of the awards is to be made in any year, including, without limitation, any adjustment of the shareholders' investment for any prior year or any adjustment of awards made prior to such discovery. To date, the Corporation

Extract From Proxy Statement of Chrysler Corporation for Annual and Special Meetings of Stockholders Held on April 15, 1963

has no knowledge of any such overstatement of the amount that may be provided for incentive compensation.

Under the terms of the shareholders' resolution, the Board of Directors is authorized to determine the terms of any incentive plans and the officers and executives who are eligible. Under the present Plan, incentive compensation awards are made by a committee of directors who are not eligible to receive awards (the Incentive Compensation Committee). At present, the Incentive Compensation Committee consists of Messrs. Neil McElroy, Chairman, James C. Brady, Arleigh A. Burke, Robert G. Page, and Louis B. Warren. The committee is not obliged to award the full amount permitted by the incentive compensation formula in the stockholders' resolution.

Employees who are eligible for consideration for an award are salaried employees of the Corporation and its subsidiaries on the last day of any calendar year who receive, as of October 1 of that year, a specified minimum salary and who have not received or been entitled to receive overtime compensation at any time during the last six months of the year and who are not eligible to participate in any other incentive plan of the Corporation or any subsidiary. The Incentive Compensation Committee may fix a salary level higher than the minimum specified in the Plan, and for 1962 fixed a salary level of $925 a month except for participants who had received previous awards.

Awards are payable at the times and upon the terms set forth on page 10 of this proxy statement and may be paid in cash or in shares of Chrysler stock, or partly in each, in the discretion of the Incentive Compensation Committee. Any shares required for such purpose are to be purchased in the market and are to be valued at the average cost per share at which they were purchased or by such other method of evaluation that the Board of Directors shall deem rea-

sonable in the circumstances. No awards have been paid in stock since 1958.

The stockholders' resolution and the Incentive Compensation Plan give the Board of Directors full power to construe and interpret them, and to correct any defect or supply any omission or reconcile any inconsistency. However, neither of them can be amended so as to increase the total provision out of earnings for Incentive Plans except by a vote of stockholders.

The provision for incentive compensation for 1962 was $3,597,900 and awards were made to 2,495 officers and employees of the Corporation and its subsidiaries (including those payable to the directors and officers shown in the Remuneration Schedule on page 9). If the proposed formula had been in effect for 1962, the total provision permitted for incentive compensation awards would have been $2,942,268. It is impossible to state to what extent the same persons (including directors and officers) will participate in future awards.

The Board of Directors recommends a vote "FOR" amending the stockholders' resolution of April 17, 1956 to change the incentive compensation formula as set forth in Exhibit C and proxies will be so voted unless stockholders direct a contrary vote.

Rules and Regulations Under Securities Exchange Act of 1934

Rule 14a-3, 17 CFR § 240.14a-3

§ 240.14a-3 *Information to be furnished security holders.* (a) No solicitation subject to §§ 240.14a-1 to 240.14a-10 shall be made unless each person solicited is concurrently furnished or has previously been furnished with a written proxy statement containing the information specified in Schedule 14A.

(b) If the solicitation is made on behalf of the management of the issuer and relates to an annual meeting of security holders at which directors are to be elected, each proxy statement furnished pursuant to paragraph (a) of this section shall be accompanied or preceded by an annual report to such security holders containing such financial statements for the last fiscal year as will, in the opinion of the management, adequately reflect the financial position and operations of the issuer. * * *

Schedule 14A

* * *

Item 9. Bonus, profit sharing and other remuneration plans. If action is to be taken with respect to any bonus, profit sharing or other remuneration plan, furnish the following information:

(a) Describe briefly the material features of the plan, identify each class of persons who will participate therein, indicate the approximate number of persons in each such class and state the basis of such participation.

(b) State separately the amounts which would have been distributable under the plan during the last fiscal year of the issuer (1) to directors and officers and (2) to employees if the plan had been in effect.

(c) State the name and position with the issuer of each person specified in item 7(a), who will participate in the plan and the amount which each such person would have received under the plan for the last fiscal year of the issuer if the plan had been in effect.

(d) Furnish such information, in addition to that required by this item and item 7, as may be necessary to describe adequately the provisions already made pursuant to all bonus, profit sharing or other remuneration or incentive plans for (i) each director or officer named in answer to item 7(a) who will participate in the plan to be acted upon; (ii) all directors and officers of the issuer as a group; and (iii) all employees.

(e) If the plan to be acted upon can be amended otherwise than by a vote of stockholders, to increase the cost thereof to the issuer or to alter the allocation of the benefits as between the groups specified in (b), state the nature of the amendments which can be so made.

Rule 14a-9, 17 CFR § 240.14a-9

§ 240.14a-9 *False or misleading statements.* No solicitation subject to §§ 240.14a-1 to 240.14a-10 shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication written or oral containing any statement which at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

Rules and Regulations Under Securities Exchange Act of 1934

NOTE: The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this section:

(a) Predictions as to specific future market values, earnings, or dividends.

(b) Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation.

(c) Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distingiush it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter.

(d) Claims made prior to a meeting regarding the results of a solicitation.

[Note added, 21 F. R. 578, Jan. 26, 1956.]